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August 27, 2001  
EXECUTIVE SECRETARY

David Waddell, Esq.  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

Re: Petition of MCI WorldCom to Enforce Interconnection Agreement with  
BellSouth Telecommunications, Inc.  
Docket No. 01-00513

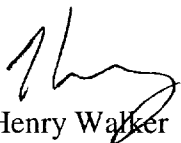
Dear David:

Enclosed is a "Motion for Summary Judgment" filed on behalf of the Petitioner in the above-captioned reciprocal compensation enforcement proceeding. Please bring it to the attention of the Hearing Officer, Mr. Jon Wike.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

  
Henry Walker

HW/nl  
attachment

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE: PETITION TO ENFORCE	)	
INTERCONNECTION AGREEMENT	)	
WITH BELL SOUTH	)	DOCKET NO. 01-00513
TELECOMMUNICATIONS, INC.	)	
	)	

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**MOTION FOR SUMMARY JUDGMENT**

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On June 12, 2001, MCI WorldCom, Inc. ("MCI WorldCom" or "Petitioner") filed a petition with the Tennessee Regulatory Authority to enforce an interconnection agreement between Brooks Fiber Communications of Tennessee, Inc. ("Brooks Fiber") and BellSouth Telecommunications, Inc. ("BellSouth"). On July, 18, 2001, BellSouth filed an Answer to the petition. Based on the undisputed allegations in the petition, the statements in BellSouth's answer, and the evidentiary record and final order recently issued in *In Re: Petition of MCI WorldCom, Inc. to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*, docket 99-00662 (June 30, 2001), Petitioner requests that the Hearing Officer issue a summary judgment granting the enforcement petition.

**FACTUAL BACKGROUND**

On May 6, 1997, BellSouth and MCI metro Access Transmission Services, Inc. ("MCI metro") entered into an interconnection agreement ("the MCI metro Agreement") which was approved by the TRA on May 30, 1997. (Docket 97-00445). The MCI metro Agreement requires each party to pay the other "reciprocal compensation" for the termination of "Local Traffic." In an Order which became effective on June 30, 2001, the TRA ruled that the term "Local Traffic" as used in that Agreement includes calls to Internet Service Providers ("ISPs")

and, therefore, that the MCImetro Agreement “requires the payment of reciprocal compensation for ISP-bound traffic.” *In Re: Petition of MCI WorldCom, Inc.*, Docket 99-00662 (hereafter, “the MCImetro case”) at 27.

On June 16, 1999, Brooks Fiber, an affiliate of MCImetro, elected to “opt in” to the MCImetro Agreement pursuant to section 251(i) of the federal Telecommunications Act. On that day, Brooks Fiber and BellSouth signed an interconnection agreement (the “Opt-In Agreement”) stating that BellSouth was required to offer, and Brooks Fiber had elected to accept, interconnection under the same terms and conditions as BellSouth provided to MCImetro.<sup>1</sup> The TRA approved the Opt-In Agreement on August 21, 2000.

### ARGUMENT

Based on the record developed in the MCImetro case and on the Authority’s final order in that case interpreting the reciprocal compensation provisions of the MCImetro Agreement, Brooks Fiber is entitled to a summary judgment without further delay.

1. After reviewing the extensive evidentiary record developed in the MCImetro case and analyzing that evidence in light of both the TRA’s prior rulings and the orders of the Federal Communications Commission (“FCC”), including the recently issued Order on Remand, the TRA declared that the MCImetro Agreement “requires the payment of reciprocal compensation for ISP-bound traffic.” Order, at 27. The Authority concluded (*Id.*, at 30):

The parties shall treat ISP-bound traffic as local traffic under this Agreement and shall pay reciprocal compensation for such traffic in accordance with the Agreement and the FCC’s *Order on*

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<sup>1</sup> The parties adopted all portions of the MCImetro Agreement except Attachment VIII which is not relevant to this enforcement proceeding.

*Remand and Report and Order*, CC Docket No. 96-98 and CC Docket 99-68, released on April 27, 2001.

Although BellSouth has appealed the Order, BellSouth has neither sought nor obtained a stay. The ruling is now in effect and the agency has ordered that it be enforced. See Order of July 12, 2001. As for as the TRA is concerned, the matter is settled.

2. Under the “opt-in” provision of the federal Telecommunications Act, Brooks Fiber is entitled to interconnect with BellSouth under the same terms and conditions as provided in the MCImetro Agreement. *See* 47 U.S.C. § 252 (i). As the TRA itself explained, a competing carrier “has an unfettered right to obtain the most generous terms and conditions made available by BellSouth” to any other carrier. *In the Complaint of AVR of Tennessee, LP d/b/a Hyperion of Tennessee, et seq.*, Docket 98-00530 (September 2, 2000) Initial Order, at 30.

As set forth in the Opt-In Agreement, Brooks Fiber exercised that right by adopting the MCImetro Agreement, a choice which was agreed to by BellSouth and approved by the TRA. Therefore, Brooks Fiber is entitled, as a matter of law, to reciprocal compensation under the same terms and conditions as provided in the MCImetro Agreement. As the TRA has ruled, those terms and conditions include the right to collect compensation for terminating calls to ISPs.

3. Since the TRA has already developed a complete evidentiary record regarding the reciprocal compensation provisions of the MCImetro Agreement, no further evidentiary hearings are required to interpret that provision as it applies to Brooks Fiber. Pursuant to T.C.A. § 4-5-313(6)(B), the agency may take judicial notice of the record developed in the MCImetro case and incorporate that record in this docket. Based on that record and on the pleadings in this case, the TRA may then issue a summary judgment in favor of Brooks Fiber.

The Tennessee Uniform Administrative Procedures Act (“UAPA”) requires evidentiary hearings only “to the extent necessary for full disclosure of all relevant facts and issues.” T.C.A. § 4-5-312(b). Where the agency has previously litigated a dispute, it is under no obligation to re-open it, absent the development of new facts or a change in the agency’s policy. *See United Cities Gas v. Tennessee Public Service Commission*, 789 S.W. 2d 256, 259 (Tenn. 1990). Here, the facts and issues concerning the reciprocal compensation provision of the MCImetro Agreement have been fully litigated. BellSouth has no right, and the TRA has no obligation, to re-litigate matters that were resolved in that earlier proceeding.

A similar situation arose in the TRA’s “BAPCO” cases. In Docket 96-01292, the Authority issued a declaratory ruling directing BellSouth Advertising and Publishing Company (“BAPCO”) to offer AT&T the opportunity to place its name and logo on the cover of the cover of the White Pages under the same terms and conditions that BAPCO offered to BellSouth. In Docket 98-00654, NEXTLINK Tennessee (now called “XO Tennessee, Inc.”) petitioned the Authority for the same relief that had been granted to AT&T. After taking judicial notice of the fact that NEXTLINK is a certified, local exchange carrier and, therefore, “similarly situated” to AT&T, the TRA granted NEXTLINK’s request without further evidentiary proceedings.

On appeal, BAPCO argued that the TRA’s failure to conduct an evidentiary hearing deprived the company of its procedural rights. The Court of Appeals brushed aside BAPCO’s argument, holding that, since NEXTLINK and AT&T were “as a matter of law” similarly situated, “further proof is neither necessary nor proper.” *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, No. M1998-00987-COA-R12-CV and M1998-01012-COA-R12-CV (February 16, 2001), appeal pending, at p. 19. The Court then quoted with approval the following, textbook explanation why an administrative agency, like a court, may issue summary judgments in appropriate circumstances (*id.*):

If the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the fact-finding process, simply because the agency does not need to resolve any factual controversies. This is a familiar principle that administrative law borrows from the concept of summary judgment in civil procedure.

Kenneth C. Davis & Richard S. Pierce, Sr., *Administrative Law Treaties*, § 9.5 (3<sup>rd</sup> ed. 1994).

In this case, BellSouth's Answer does not dispute that Brooks Fiber has properly elected to adopt the terms and conditions of the MCImetro Agreement and that those terms and conditions were addressed by the Authority in the MCImetro case. BellSouth itself argues that the instant complaint should be resolved "as a matter of law." Answer, paragraph 8. There is no indication in the company's answer that there are any relevant disputed facts or that BellSouth seeks an evidentiary hearing.<sup>2</sup>

### CONCLUSION

BellSouth has a history of using delaying tactics to avoid paying reciprocal compensation for ISP-bound traffic. *See* Docket 99-00662, Order of July 12, 2001. Such tactics undermine the financial stability of competing carriers and impede the development of an open market. In this case, the TRA has both the power and the duty to prevent that from happening. Therefore, the Hearing Officer should take judicial notice of the entire record in the MCImetro case and issue a summary judgment ordering BellSouth to pay Brooks Fiber reciprocal compensation for ISP-

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<sup>2</sup> BellSouth's Answer indicates that the company intends to rely primarily on the argument that, at the time Brooks Fiber elected to adopt the MCImetro Agreement, Brooks Fiber was aware that BellSouth did not believe that the Agreement required the payment of reciprocal compensation for ISP traffic and, therefore, BellSouth never agreed to pay Brooks Fiber for such traffic. Such an argument, if accepted, would defeat the whole purpose of the "opt in" requirement. Regardless of BellSouth's interpretation of the MCImetro agreement, the TRA has now ruled that the Agreement does, in fact, require payment for those calls. Under federal law, BellSouth is therefore obligated to offer the same terms to Brooks Fiber. BellSouth's state of mind at the time of signing the Opt In Agreement is irrelevant.

bound traffic as provided in the Opt-In Agreement.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: \_\_\_\_\_

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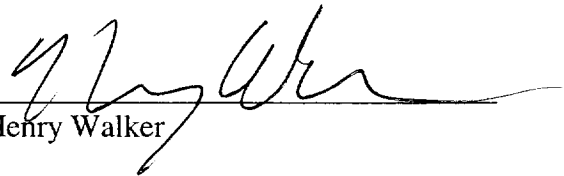
Nashville, Tennessee 37219

(615) 252-2363

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 27<sup>th</sup> day of August, 2001.

Guy Hicks, Esq.  
BellSouth Telecommunications, Inc.  
333 Commerce St., Suite 2101  
Nashville, TN 37201-3300

  
Henry Walker